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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 26

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant,

vs.

[illegible] A. McGINLEY, District Attorney, County of Lehigh, [illegible] Deputy District Attorney, and GEORGE J. JOSEPH, Solicitor, County of Lehigh, Pennsylvania, Individually and as Official Defendants,

Appellees.

APPEAL FROM THE FINAL ORDER OF A THREE JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. SEC. 2281 ET SEQ.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.
No. 699.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

vs.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,
Appellees.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE.

STATEMENT OF INTEREST.

The American Civil Liberties Union appears *amicus* with consent of the parties in support of the position advanced by the appellant, "Two Guys from Harrison-Allentown, Inc.", having appeared in the same position in the courts below. This brief seeks to avoid mere reiteration of appellant's presentation.

The American Civil Liberties Union is a non-profit, non-

partisan organization dedicated to the protection and advancement of the rights guaranteed in the Constitution of the United States and particularly in the Bill of Rights.

One of the most important rights granted by the United States constitution is that relating to the prohibition of the establishment of religion and the freedom of religion under the First Amendment. In relation to the Sunday laws restricting the right of persons to labor on Sunday and to sell legitimate merchandise on Sunday, state legislatures have declared that these laws do not purport to be laws relating to religion but are really laws designed to protect the health and welfare of the population by limiting their right to labor to six days per week and restricting the sale of merchandise to six days per week, and are alleged to be constitutional under the police power. This is patently a subterfuge to hide the real purpose of the legislation, namely,—to set aside Sunday as the Christian Sabbath so as to insure its religious observance for the majority of the American population, Willis, Constitutional Law (1936), p. 749, and "the truth is, however much it may be disguised, that this one day of rest is a purely religious idea," Terry, C. J. in *Ex parte Newman*, 9 Cal. 502, 509 (1858); Konvitz, Fundamental Liberties of a Free People, 75 (1957); Comment, 64 Harvard L. Rev. 1194, 1195 (1951). Because others are attacking Sunday Laws on religious grounds under the First Amendment, a position with which the American Civil Liberties Union is in accord, this brief will be devoted to the issues of the freedom to contract to sell one's labor and to use one's property for the purpose of selling on any day of the week, rights protected by the Fourteenth Amendment.

STATEMENT OF THE CASE.

The Penal Code of the Commonwealth of Pennsylvania, Act of June 24, 1939, P. L. 872 as amended in 1959, contains two general provisions relating to employment and business, Sec. 699.4, 18 Purd. Stat. §4699.4, and to selling at retail, §699.10, 18 Purd. Stat. §4699.10. These statutes, when and if enforced, would prevent on Sundays the plaintiff corporation from selling its merchandise and its employees from working in its retail store in Lehigh County, Pennsylvania. The plaintiff sought an injunction to prevent the defendant, the District Attorney of Lehigh County, from enforcing these laws against the plaintiff and its employees. The store is open for business seven days of the week, although no employee works more than six days per week. About one-third of its business is transacted on Sunday. After a hearing, a statutory three-judge court, with one dissent, denied the request for relief of the plaintiff which filed its appeal to the Supreme Court.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED.

This brief is addressed solely to whether a Sunday closing law which compels a legitimate business to close one day a week and which prohibits a person from working on Sunday is such an unlawful limitation of the right to contract and to use one's property as to violate the Fourteenth Amendment of the United States Constitution.

ARGUMENT.

A State legislature may require one day of rest in seven, but may not constitutionally deprive a person of the liberty to choose the day of the week on which he shall refrain from laboring or selling by requiring him to desist only on Sunday.

For the purpose of this argument, we will accept the contention that Sunday Laws are solely "civil legislation" and are not religiously inspired or motivated. We assert the constitutional invalidity of Sunday Laws, however, on the ground that although the legislature, under its police power, may require each individual to desist from work for at least one day per week, it may not constitutionally designate the particular day of the week for universal rest. Even if a statute "made Monday, instead of Sunday, a day of compulsory rest, the constitutional question would have been the same", Burton, J., concurring opinion, *Ex parte Newman*, 9 Cal. 502, 513 (1858). A state law may not require a business for one day in seven to close its doors or to refrain from selling its merchandise. A statute may limit the freedom of an individual to contract to sell and to sell his labor for seven days a week but it may not deprive the individual of his right himself to choose the day on which he will refrain from labor. A statute may not limit the freedom of a person, individual or corporate, to sell merchandise seven days per week under the guise of requiring that business to remain idle at least one day per week.

A. At common law all business may be transacted on Sunday.

"By the common law all judicial proceedings on Sunday were forbidden. Any other business could lawfully be

transacted", *Ward v. Ward*, 77 N. W. 965 (Minn. 1899). See also *Commonwealth v. Foster*, 28 Pa. Superior Ct. 400 (1905); *Commonwealth v. Teaman*, 1 Philadelphia 460, 461 (1853). Statutes are required, therefore, to make Sunday business illegal, subject, however, to the absence of any constitutional inhibition.

B. State may require one day of rest in seven but may not determine the day for universal rest.

It is generally conceded that the human being needs at least one day of rest each week to meet his physical need for regeneration. It is further recognized that some people ignore this urgent need as a result of which the State for its own protection must compel such persons to desist from work periodically. The law, in its awareness of the problem, enables the legislature under the police power to require each person to desist from labor one day in seven. The claimed purpose is "to protect all persons from the physical and moral debasement which comes from uninterrupted labor", *Soon Hing v. Crowley*, 113 U. S. 703, 710 (1885). "It is upon that basis that the prevalent type of Sunday law is sustained," *Two Guys from Harrison v. Furman*, 160 A. 2d 265, 273 (1960). "It establishes, as a civil regulation, a day of rest from secular pursuits, and that is its only scope and purpose," Field, J. dissent in *Ex parte Newman*, 9 Cal. 502, 519 (1858). Its "object mainly was to protect the employees by insuring them a day of rest," *Petit v. Minnesota*, 177 U. S. 164, 168 (1900). This restriction on the right to work on Sunday, however, constitutes a limitation upon the liberty of the individual which is justified by the community's need to protect the health of its constituents even though involuntarily imposed.

The Supreme Court of the United States in the three early decisions of *Soon Hing v. Crowley*, supra, *Hennington v. Georgia*, 163 U. S. 299 (1896), and *Petit v. Minnesota*,

supra, upheld the right of a State to prohibit Sunday labor. In the *Hennington* Case, the Court justifies the right to designate Sunday as a universal day of rest, in the following language:

> "The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness, and health of the people, it was within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor" at page 304.
>
> "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regular recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest" at page 305.

It is not contended that it is "for the judiciary to say that the wrong day was fixed" when Sunday was chosen, but it is for the court to say that the legislature may not constitutionally fix a particular day to rest from labor each week.

1. *Each person may choose for himself a day of rest which best meets his needs and desires.*

While the legislature may require a day of rest in seven, it is not within the competency of the legislature to fix the day of rest, and the Supreme Court of the United States as constituted in 1896 was in error when it so declared without demonstrating by authority, logic and reason that the

legislature possessed the right to designate a specific day for rest and not allow the individual to determine for himself the day upon which he wishes to desist from labor, a day which best accords with his religious convictions or his economic or social desires.

The right of self-determination is aptly stated in the flag salute case by Justice Jackson in *W. Va. Board of Education v. Barnette*, 319 U. S. 624, 630 (1943):

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. . . . The sole conflict is between authority and the rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on *the right of self-determination* in matters that touch individual opinion and personal attitudes." (Emphasis ours.)

2. *Requiring universal rest from labor on Sunday has no necessary or reasonable relationship to the need to rest one day a week.*

Sunday laws impose two limitations upon the liberty and freedom of the individual. One is the proper restriction on the common law right of each person to work every day of the week. The other is the limitation on his right to choose the day of the week on which he shall take his rest. The real issue is whether the State may further limit the individual's liberty and freedom by withdrawing from him the freedom to choose the day. Is there a necessity to specify a day? If the purpose is to assure a day of rest in seven, then there is no need to require a particular day since the

object is to provide the twenty-four hours of rest regardless of the day.

The Supreme Court of Pennsylvania makes the following declaration on the exercise of the police power:

> "By a host of authorities, Federal and State alike, it has been held that a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts," *Gambone v. Commonwealth*, 375 Pa. 547, 551-2 (1954); *Commonwealth ex rel. v. Sun Ray Drug Co.*, 383 Pa. 1, 10-11 (1955).
>
> "The valid exercise of the state's police power requires that there be a substantial nexus between the end to be achieved and the legislation enacted for that purpose, accomplished without interference with the fundamental rights guaranteed to the individual," Sunday Laws, 25 Southern California L. Rev. 131, 134 (1952).

The only justification for legislative choice of one day applying to all is the difficulty of enforcement. Thus in *State of Ohio v. Ullner*, 143 N. E. 2d 849, 105 Oh. App. 546 (1957), at 851-2:

> "But it is said that while requiring the observance of one day out of seven as a day of rest is a valid exer-

cise of the police power, that power does not authorize the fixing of a specific day of the week as a day of rest. . . .

"If designating a specific week day as the day of rest is beyond the power of the legislature, it must be for some other reason. We do not think that the legislature is required to assign a reason for fixing a specific day, rather than leaving it to individual choice. We think valid reasons could be stated. In passing legislation, it is a proper object to consider the ease or difficulty of enforcement. Now certainly the power to enforce the observance of a specific day of rest would be much easier than to enforce a day of rest selected by the individual. It would seem that the latter would not only be difficult but in fact impossible to enforce."

The Superior Court of Pennsylvania in *Commonwealth v. Bauder*, 188 Pa. Superior Ct. 424, 426 (1958), in a per curiam opinion adopts the language of the lower court in 14 Pa. D. & C. 2d 571, 579, as follows:

"It appears to us that there is: (1) A valid reason to select one specific day upon which all persons shall rest; and (2) a reason not advanced in the Specht case why Sunday should be that day. The two reasons serve one purpose, namely, ease of enforcement.

"If the day of rest chosen is one which the great majority of people are already bound by conscience to observe, the State will have the sanction of conscience as well as the fear of punishment as a motive for enforcement of its policy of relief from labor. Everyone connected with the enforcement of law can testify to the support given to the maintenance of law and order by those who obey the law from conscience rather than from fear of punishment.

"It can readily be seen that selecting a specific day greatly aids in the enforcement of the law. If a person is found engaging in worldly employment on a Sunday,

> he is guilty. He is also more conspicuous and easier to detect than he would be if others were legally employed in the same occupation on that day. To permit a person to rest on a day of his own choice would compel the Commonwealth to prove which was the day of his choice and that he had not rested on that day or if he had no day of his own choice to prove that he had worked on each of the other six days of the week. Any such requirement would practically nullify the law."

The fact that the requirement of one day of rest in seven with the individual choosing the day would cause inconvenience in enforcement is not sufficient reason to take the right of choice of day of rest from the individual. Thus, in *Commonwealth v. Tagola*, 89 Pittsburgh Law Journal 187 (Penna. 1941), an ordinance limited the hours a barber shop could keep open. The Court states:

> "The contention that adequate inspection will be impossible if the shops are open at all hours is manifestly untenable; perhaps adequate inspection may require either a larger force of inspectors or a division of the force. These, however, are mere matters of convenience for the city. They do not constitute a standard for determination and afford no basis for an otherwise unwarranted interference with the use and control of the property of the complainants."

The Supreme Court of the United States has concerned itself with the problem of extending the permissible scope of a restrictive regulation to innocent acts in order effectively to enforce the law against the evil toward which the law is directed. Thus in *Carolene Products Co. v. United States*, 323 U. S. 18 (1944), it was held that only if there was no other way to enforce the law other than by prohibiting the sale of a wholesome article, could the restriction be applied to innocent acts, citing and distinguishing *Weaver v. Palmer Bros. Co.*, 270 Pa. 402 (1926). In the

latter case a Pennsylvania statute prohibited the use of shoddy in the manufacture of comfortables. Plaintiff in using shoddy sterilized the material so as to render it harmless. It was also shown that no deception could occur because of adequate provisions for inspection of the places of manufacture and sale, and for tags to be applied to the comfortables to clearly identify the nature of the filling. The court declared the prohibition invalid, declaring at page 415:

> "The constitutional guaranties may not be made to yield to mere convenience. Schlesinger v. Wisconsin, decided March 1, 1926, 270 U. S. 230. . . . The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th Amendment. . . ."

So also in *Schlesinger v. Wisconsin*, 270 U. S. 230 (1926), the State of Wisconsin sought to tax all gifts made within six years of death as conclusively made in contemplation of death without regard to the actual intent. Wisconsin attempted to justify this on the ground that this was necessary for effective enforcement "to prevent evasion of inheritance taxes. The court struck this provision down in the following language at page 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is for-

bidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

It is our contention that a "one day of rest in seven" law can be effectively enforced, leaving the choice to the individual, without the need to prohibit all work or selling on Sunday as a universal day of rest. There is nothing inherently wrong in laboring on Sunday and, therefore, it may not be forbidden on the theory that only by making Sunday work illegal can one achieve the laudable purpose of requiring each person to rest one day per week.

a. One Day of Rest in Seven Laws.

If the sole purpose of the Sunday Laws is to assure to each individual at least one day of rest in seven, this avowed goal can be effectively achieved and adequately enforced under a "one day of rest in seven" law, thereby obviating the necessity of legislatively decreeing a specific day.

"One day of rest in seven" laws are not difficult of enforcement. Five states (Arizona, California, Oregon, Wisconsin and Wyoming) have repealed their Sunday Laws and have replaced them "with statutes requiring one day of rest in seven, without signifying the day : . .", Sunday Laws, supra, at page 134. Nevada has no Sunday Law but has a six day a week law. Connecticut, Illinois, Kentucky, Massachusetts, New Hampshire, New York and Pennsylvania have one day of rest in seven laws for certain industries and businesses and employees, although they have general Sunday Closing Laws. For a compilation of these laws see *Commerce Clearing House*, 4 and 4A Labor Law Reporter—State Laws.

The law is effectively enforced by requiring the posting of a list of employes required to work on Sunday and designating other particular days of rest for each and filing

a copy with the Commissioner of Labor, filing a copy of every change, and further keeping records of hours worked each day by each employe. See *People v. Klinck Packing Company*, 214 N. Y. 121, 108 N. E. 278 (1915). Other States requiring twenty-four consecutive hours of rest in every week, provide also for such posting, filing with Director of Labor, keeping of Time Books, and prohibiting such employee to work on his designated day of rest, and penalty for each offense. 48 Ill. Anno. Stat., §§8a-8g; 4B Ann. Laws of Mass., §§47-52; Rev. Stat. New Hampshire, 1955 Ch. 275, §§32, 33. Pennsylvania requires that every employee of a motion picture theatre, 43 Purd. Stat. §481, and every projectionist, 4 Purd. Stat., §60, shall have 24 consecutive hours of rest each week. Most states provide for a six day week for females and minors, the enforcement of which laws is placed into the effective jurisdiction of Departments of Labor, See State and Federal Hours Limitations, Bulletin No. 116, U. S. Department of Labor (1950).

The substitution of "one day of rest in seven" laws for Sunday Rest Laws has been approved by many students of the subject. Czarra, Sunday Statutes in a Modern Community, 61 Yale L. J. 427, 433-4 (1952):

> "Clearly, Sunday Statutes are undesirable in a modern community. Since the Supreme Court has declined to treat the problem on the constitutional level, the only remaining remedy is repeal. A program for legislative action should have three phases. First, repeal of all statutes prohibiting or regulating business, labor or other activity on Sunday. Second, enactment of a statute providing that in every week each person must receive at least one day of rest and that each business must close at least one day, except in emergencies. This is necessary to supplement federal wage and hour laws where state regulation of interstate commerce is lacking or insufficient. Third, enactment of a statute prohibiting any wilful disturbance of a religious meeting whenever held. In addition, conscientious and

effective enforcement of existing peace statutes is essential to protect the community right to quiet and repose. Such a system would eliminate the religious overtones of Sunday Statutes while accomplishing their legitimate civil objectives. Effective utilization of leisure time will be permitted and the statute books will be rid of the burden of archaic laws which no longer reflect community mores."

Comment, 5 Villanova L. Rev. 308, 310-1 (1960).

"Unquestionably a periodic day of rest is important to strengthen the mental, physical and moral fiber of the community; however, the reasonableness of these statutes must be tested in balancing the interest in free exercise of religion against the police power interest sought to be advanced and the availability of alternative techniques for accomplishing the same purposes. The availability of acceptable alternatives is evidenced by the Sunday statutes containing exceptions which make them inapplicable to religious groups whose sabbath occurs on a day other than Sunday. Even Sunday statutes containing exception clauses of this nature seem to be a poor solution, when it is apparent that the religious objections can be remedied and the same health and welfare purposes achieved by enacting a statute which provided for one day's abstention from labor or business but leaves the choice of the particular day to the individual."

Note, 21 Univ. of Pitts. L. Rev. 123, 131 (1959).

"Clearly the only unobjectionable type of statute for a day of rest is the one that requires one day in seven for rest without specifying any particular day. The American Federation of Labor favors this type of law which leaves to each individual the right to select his own day of rest and the manner of its observance.

"Such legislation would constitute civil legislation and make for religious liberty. It would leave the religious element out of the question and this is perhaps the logical way to dispose of the Sunday law question."

A. H. Lewis, Sunday Legislation (1902), p. VIII, refers to a new approach to the problem of Sunday as an involuntary day of rest; "a new departure which will secure permissive and protected rest to each employed person for one day in the week, the day being determined by the employed person and the employer."

Some writers, Note, Sunday Laws, 73 Harv. L. Rev. 729, 740-1 (1960) and Comment, 6 Utah L. Rev. 581, 585 (1959), generally approve "one day of rest in seven laws" as an alternative to Sunday Laws provided that it can be demonstrated that the former laws are adequately enforceable. These latter writers, however, should not be too deeply disturbed for there are many factors in existence to render these laws effective.

Since the United States is a religious nation, the large majority of people will refrain from work one day per week in consonance with their religious convictions. Others will adhere to a six day week under the theory that "man tends to protect himself from overwork." Wolf, Blue Law Blues, 32 Rocky Mountain L. Rev. 243, 245 (1960). "Without governmental compulsion, most people would probably still eschew a seven-day work week, and their individual inclination would in many instances be reinforced by trade association or union power," Note, Sunday Laws, supra at page 740-1. "Modern-day unions and social legislation generally act to afford repose from uninterrupted labor and refute Justice Field's argument upholding Sunday legislation based upon capital's oppression of the laboring masses", Wolf, supra at page 245. "The deterrent effect of penalty rates on the extensions of work over the week-end holidays" induces "tendency to limit work on week-ends,"

Saturday and Sunday Pay Provisions of Union Agreements in Twelve War Industries (U. S. Dep't of Labor, 1942) 2, as does the overtime pay provisions of the Federal Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A. §207, and the 5-day, 40-hour-week provision in the normal, bargained labor agreement, Goldner, Hours of Work (1952) p. 15; Stieber, Non-Wage Aspects of Collective Bargaining, 8 Business Topics 26, 33 (1960), in most industries, a regular Monday through Friday workweek being prevalent, Collective Bargaining-Week-end Work (U. S. Dep't of Labor Bulletin No. 908-2, 1948) p. 29. In addition to all this, a "one day of rest in seven" law providing for posting the premises, notifying the state Director of Labor or local authorities, keeping time records, adequate penalties, and conscientious enforcement, will result in effective and meaningful legislation, free of any religious overtones or minority resentment.

b. *Exemption of observers of other Sabbaths.*

Sixteen states and England have Sunday Laws with exemptions for persons observing other days as their Sabbath. These are Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, New Jersey, New York (except public selling), Ohio, Oklahoma, Texas and West Virginia. Some require that they notify the District Attorney, that they do not disturb others attending public worship, that they may not operate a business within a certain distance of church services, and that they do not compel employees of a different belief to work on Sunday. These laws are easily enforced by providing that the shopkeeper must close his place of business on Saturday, give notice to the local authorities of his intention to do so and post notice of this practice in the shop, see Skottowe, the Law Relating to Sunday (London, 1936).

The widespread prevalence of Sabbath exemption provi-

sions constitutes clear proof that Sunday Laws are not necessary to assure a respite from work one day per week, especially for those who are sincere in their religious beliefs.

c. *Hours of work laws.*

All states have enacted laws relating to hours of work and most of these apply to women and minors. Many of them also limit the number of days per week in which they may work, ordinarily not more than six. See State and Federal Hours Limitations, supra. Others go further and forbid such work during the night, *Radice v. New York*, 264 U. S. 292 (1923). All these laws contain provisions for the enforcement and there is no reason to believe that they have not been effective or that the investigating and inspection arms of the enforcement agencies cannot properly and adequately compel a "one day of rest in seven" law.

If, therefore, for many years there have existed, in the statute books of this country, laws limiting hours of work, exempting from Sunday laws observers of other Sabbaths and "one day of rest in seven" laws, which from all available evidence are operating satisfactorily and being properly enforced, there is, therefore, no need for a law compelling universal rest on Sunday and depriving the individual of the right to choose for himself the day upon which he will desist from labor. The existence of these statutes with their enforcement provisions and penalties clearly demonstrates that there is no need for Sunday Laws "to protect the employees by insuring them a day of rest" or "all persons from the physical and moral debasement which comes from uninterrupted labor."

3. If alternative methods are available to achieve a desired goal, that method must be used which entails less deprivation of constitutional rights.

If alternative methods are available for attaining a desired end, the fact that one entails a greater deprivation than the other is a factor for consideration in the validity of the legislative choice, Dowling, Cases on Constitutional Law (6th ed.) p. 714, citing *Weaver v. Palmer Bros. Co.*, 270 U. S. 402 (1926); see *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951). If a legislative goal can be achieved at a lower price in terms of limitation of rights of individuals that choice must be made which least interferes with these rights, (Note) Consideration of Facts in Due Process Cases, 30 Columbia Law Review 360, 362 (1930).

The Supreme Court of the United States approved this principle in *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951). In this case the City of Madison enacted an ordinance forbidding the sale of milk in the city as pasteurized unless it had been pasteurized and bottled at an approved pasteurization plant within five miles of the center of the city. The appellant's plant was more than 5 miles away. The court declared the ordinance unconstitutional as unjustifiably discriminating against interstate commerce in violation of the commerce clause of the Federal Constitution. The court found that the city could send inspectors to plants outside the five-mile limit and charge the costs to the plant. Since this alternative method of inspection existed, the five mile limitation was unreasonable and invalid. The court declared:

> "Even in the exercise of its unquestioned power to protect the health and safety of its people, a municipality may not erect an economic barrier protecting a major local industry against competition from without the state, if reasonable non-discriminatory alternatives, adequate to conserve legitimate local interests, are available."

Justice Black dissented on the ground that the "reasonable alternative" concept should apply only to First Amendment rights. In view of the fact that freedom of religion is involved in the instant case, it is reasonable to assume that Justice Black would not hesitate to apply this salutary doctrine to invalidate Sunday Laws.

In the case of *W. Va. Board of Education v. Barnette*, supra, the school board sought to justify compulsory flag salute as a method to "inspire patriotism and love of country". The court struck it down by declaring that a satisfactory alternative existed by teaching these concepts directly through history and civics without depriving a child of its right to maintain its religious convictions.

See also the opinion of Judge Alexander in the Sunday Law cases of *Commonwealth v. Cavalerro and Levenston*, Court of Quarter Sessions of Philadelphia County, Pennsylvania, The Legal Intelligencer, April 22, 1960, p. 1, 12, f.n. 6:

> "(b) *Many states . . . have one-day-in-seven rest laws. . . . and I know of no problem in connection with their enforcement,* or with the enforcement of the labor laws referred to in (a) above. Indeed, such laws generally are enforced, whereas the sporadic or discriminatory enforcement of the Sunday laws is common knowledge, and tends to bring law enforcement generally into disrepute. (c) *Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used, and mere ease of enforcing a more restrictive alternative will not sustain it.*" See, e.g. *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949). (Emphasis ours.)

As adverted to above, a "one day of rest in seven" law is a reasonable, non-discriminatory alternative to Sunday Laws as a result of which the latter should be declared unconstitutional.

CONCLUSION

Our laws generally are directed not to the right of an owner to sell his goods, but to the manner in which he may sell them, *Commonwealth v. Gardner*, 133 Pa. 284 (1890). It is a false idea that the time of an act could have anything to do with its moral nature, all other things being equal, Ringgold, the Law of Sunday (1891), p. 73. It is unthinkable that there is a power in the State, absent as to secular days, to limit a right solely on Sunday, *Brattle Films v. Commissioner of Public Safety*, 333 Mass. 58, 127 N. E. 2d 891 (1956). The legislature may not arbitrarily limit the time when an otherwise legitimate sale may be made, but may restrict the manner in which the sale is made in order to protect the community.

Thus if the desired legislative purpose is to provide compulsorily one day of rest in seven, then the legislature in choosing a technique to accomplish this purpose, having a choice of two methods of reaching its goal, must choose that one which least interferes with the constitutional rights of the individual consistent with effective enforcement. For if effective enforcement is absent, the goal is not achieved. If, therefore, the legislative purpose is to assure a day of rest each week, it is sufficient for the legislature to declare that no one may work more than six days a week, and to permit the individuals concerned, by contract, to determine which day of the week shall constitute the day of rest. A survey of the statutes relating to the enforcement of legislation providing for one day of rest in seven, for exemptions from the Sunday law for those observing other days of rest, and for hours of work for women and children, will demonstrate that techniques of enforcement are available in order to accomplish the desired goal, namely, the substantial certainty that the population will be assured under law one day of rest in seven

so that the need to provide rest, recreation, worship and physical revival will be provided.

The old Supreme Court cases upholding Sunday laws based on the police power of the states to pick Sunday as a universal day of rest should be overruled as has been evidenced in recent Supreme Court decisions in matters of great public concern and changed conditions, especially since these cases indicate a failure to consider thoroughly the constitutional question of the right to choose a specific day of rest. The automobile age, the distance of shopping centers from concentrated areas of population, the demands of minorities to observe their own days of rest for purposes of religious worship, the need of the public for manifold forms of recreation and entertainment on their days of rest: all these call upon the judicial arm of our government to protect the right of all men to choose their form of rest and worship and also the time of rest and worship so long as it does not interfere with the right of others to enjoy their days of rest and worship in the manner and at the time they see fit. The changed habits of the people, and the growth of towns and cities in contrast to the essentially village conditions of earlier centuries, the development of motor transport, and above all the effect of two world wars have made the State regulation of Sunday almost an anachronism," Murray, the State and the Church in a Free Society (1958) p. 166.

> "Appellate courts on both state and federal levels have declared it to be a duty as well as a right of the court to re-examine and correct previous decisions which have been shown to be erroneous in the light of later experience or which have been based on conditions which have altered through the passage of time. This flexibility has had most interesting results in such vital areas as civil rights," Moore, Stare Decisis (1958) p. 45.

If there is any situation in which conditions have altered through the passage of time, it is the situation pertaining

to Sunday Laws and the Supreme Court should have no hesitancy in reversing and overruling the old cases supporting them.

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